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MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-427

BERKEY PHOTO, INC.,

Petitioner,

against

EASTMAN KODAK COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

PAGE

1. Contrary to Kodak's contentions, the opinion below dramatically departed from existing law on monopolization and will have enormous and pernicious implications for Section 2 enforcement 2

2. This Court should not require further protracted and misdirected proceedings before ruling on questions of first impression relating to the film and paper overcharge claims 6

3. Kodak's contention that its monopolies are based on salutary conduct and are socially desirable flouts the record, the jury findings and the condemnation of monopoly reflected in the Sherman Act. It thus further focuses the case on critically important issues which should be reviewed by this Court sooner rather than later 8

Conclusion 11

TABLE OF AUTHORITIES

Cases:

American Construction Co. v. *Jacksonville T. & K.W. Ry.*, 148 U.S. 372 (1893) ..... 6 n. 9

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) ..... 2 n. 2, 3 n. 4, 10

California Computer Products, Inc. v. *IBM Corp.*, 1979-1 Trade Cas. ¶ 62,713 (9th Cir. 1979) 4

Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) ..... 6 n. 10

PAGE

Gough v. *Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973) 4

Greyhound Computer Corp. v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ..... 2 n. 2, 5

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ..... 2 n. 2

Land v. *Dollar*, 330 U.S. 731 (1947) ..... 6 n. 8

Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) ..... 6 nn. 8 and 10

Sherman v. *British Leyland Motors, Ltd.*, 1979-2 Trade Cas. ¶ 62,784 (9th Cir. 1979) 4

In re Simons, 247 U.S. 231 (1918) ..... 6 n. 10

Transamerica Computer Co. v. *IBM Corp.*, No. C 73-1832 RHS (N.D. Cal. Oct. 18, 1979) 4

United States v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (*"Alcoa"*) ..... 2, 3 and n. 4, 9, 10

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) ..... 6 n. 8

United States v. *Griffith*, 334 U.S. 100 (1948) .. 2 and n. 1, 10

United States v. *Grinnell Corp.*, 384 U.S. 563 (1966) ..... 2 and n. 1, 10

PAGE

United States v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) ..... 2 and n. 2

Zenith Radio Corp. v. *Matsushita Electric Industrial Co.*, 1979-2 Trade Cas. ¶ 62,893 (E.D. Pa. 1979) ..... 10 n. 17

Statutes:

Sherman Act, Section 2, 15 U.S.C. § 2 ..... *passim*

Miscellaneous:

P. Areeda & D. Turner, *Antitrust Law* (1978) 2 n. 3

Posner, *The Antitrust Decisions of the Burger Court*, 47 Antitrust L.J. 819 (1978) ..... 10 n. 18

L. Sullivan, *Handbook of the Law of Antitrust* (1977) ..... 2 n. 3

January 1979 Report of the National Commission for Review of Antitrust Laws and Procedures ..... 10 n. 18

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REPLY BRIEF FOR PETITIONER

This reply brief is submitted in support of Berkey's Petition for a Writ of Certiorari. We respectfully refer the Court to Berkey's brief in response to Kodak's cross-petition for certiorari in No. 79-499 which further demonstrates the urgent need for review of this cause. We submit that the contentions made in support of the instant petition are particularly compelling since, after a long jury trial, (i) the District Judge wrote two careful and detailed opinions on questions which he recognized to be difficult and of great importance for antitrust jurisprudence; (ii) the Court of Appeals reached contrary results on many of these questions, in an opinion which repeatedly notes the importance, complexity and novelty of the issues involved; and (iii) both sides have now sought certiorari.

1. Contrary to Kodak's contentions, the opinion below dramatically departed from existing law on monopolization and will have enormous and pernicious implications for Section 2 enforcement.

Berkey demonstrated (Petition, pp. 19-23) that the Court of Appeals' opinion was an abrupt change of the law on monopolization. Kodak's contention (Brief in Opposition, pp. 12-15) that prior controlling Section 2 cases such as *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*"Alcoa"*); and *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) also enunciated a requirement of "unlawful and exclusionary" acts to establish unlawful monopolization is belied by (i) those very opinions, which explicitly negate the need to show unlawful acts,[1] (ii) other opinions of this Court and various Circuits which reject such a requirement,[2] and (iii) leading commentators who unequivocally describe the prior controlling precedents as rejecting the rule which Kodak vainly strives to harmonize with those cases.[3] Moreover,

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[1] The confusion inherent in the Court of Appeals' opinion is further illustrated by the fact that, at a point in the opinion which is ignored by Kodak, the Court reads *Grinnell* and *Griffith* as negating the requirement of unlawful conduct in acquiring the monopoly (21a), a requirement which Kodak now urges was "mandated" by *Grinnell* and *Griffith* (Brief in Opposition, pp. 12-15).

[2] *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 498-99 (1968); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946); *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *United States* v. *United Shoe Machinery Corp.*, *supra* at 345. (See also Petition, p. 21).

[3] *See, e.g.*, III P. Areeda & D. Turner, *Antitrust Law* ¶ 613 (1978): "It is clearly unlawful to achieve or maintain monopoly by a combination, by a restraint of trade violating § 1, by conduct that is immoral or predatory or otherwise not 'honestly industrial,' or by an 'exclusionary' practice." *See also* L. Sullivan, *Handbook of the Law of Antitrust* 94 *et seq.* (1977).

the Court of Appeals expressly noted that the opinion broke new ground on issues which are fundamental to Section 2 (*e.g.*, 7a, 14a, 18a, 40a, 71a-73a), and candidly rejected much of the teaching of *Alcoa* (18a-20a).[4]

Fundamental to the holding of the Court of Appeals was the determination that the perceived benefits of integration immunize from antitrust scrutiny certain conduct associated with product introduction, without regard to the surrounding market structure or the purpose or effect of the conduct (see Petition, pp. 26-31). Kodak cites no precedent supporting this view of integration or the enunciation of *per se* rules which create such enclaves of immunity for any type of conduct. Instead, it denies (*e.g.*, Brief in Opposition, pp. 8, 14) that rules of *per se* legality were urged by it or reflected in the opinion of the Court of Appeals. What Kodak dismisses as "the rhetoric of the district court" (Brief in Opposition, p. 8) is an accurate description of Kodak's reliance on such a rule in the District Court (see Petition, p. 6 n. 9) and in the Court of Appeals (see 46a n. 30). The Court of Appeals' assump-

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[4] Kodak's suggestion that *Alcoa* was merely construed and followed (Brief in Opposition, p. 13) flouts the observations of the Court of Appeals (18a-20a) and is not consistent with professional comment on the matter. Illustratively, this year's review on Recent Antitrust Developments by the Association of the Bar of the City of New York is entitled in part: "Berkey v. Kodak: The Demise of Alcoa . . . ." This is the lecture long given annually by Professor Milton Handler and to be presented this year by his partner, Stanley D. Robinson. We submit that the importance of *Alcoa*, the fact that it was decided under a statute making it tantamount to a Supreme Court opinion and its explicit approval by this Court (*see American Tobacco Co.* v. *United States, supra* at 811-14), all require that if it is to be buried, the interment be done by this Court.

tion of the lawfulness of the activities of an integrated monopolist, its failure to require factual or economic support for the proposition, its refusal to evaluate Kodak's conduct in terms of purpose, effect or market structure, its rejection of explicit jury findings and the failure to remand for further jury consideration of such matters are consistent only with a determination that the conduct was deemed *per se* lawful.[5] Contrary to Kodak's conclusory dismissal of a conflict with any other opinion or Circuit (Brief in Opposition, p. 15), in considering conduct involving the introduction of products by an integrated monopolist, and in direct conflict with the last described approach of the Court of Appeals below, the Ninth Circuit would, *inter alia,*

> ". . . allow the factfinder to consider the effects of the design on competitors; the effects of the design on consumers; the degree to which the design was the product of desirable technological creativity; and the monopolist's intent. . . ."

Transamerica Computer Co. v. *IBM Corp.,* No. C 73-1832 RHS (N.D. Cal. Oct. 18, 1979) (slip opinion at 79), applying the Ninth Circuit rule as enunciated in *Sherman* v. *British Leyland Motors, Ltd.,* 1979-2 Trade Cas. ¶ 62,784 at 78,547-48 n. 46 (9th Cir. 1979); *California Computer Products, Inc.* v. *IBM Corp.,* 1979-1 Trade Cas. ¶ 62,713 at 77,975 (9th Cir. 1979); and *Gough* v. *Rossmoor Corp.,* 487

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[5] See also Petition, p. 27 and n. 40; Kodak's statement (Brief in Opposition, pp. 7-8) that the Court of Appeals held that product introduction can only expand competition, manifestly reflects a *per se* rule (even though Berkey did not challenge the introduction of any product, but the surrounding conduct). Similarly, when Kodak there describes the Court's rejection of an explicit jury finding, which is inconsistent with its opinion, as a disagreement, it establishes that the Court was ruling on the propriety of the conduct as a matter of law, since it cannot "disagree" with a jury on a factual determination.

F.2d 373, 376 (9th Cir. 1973). (*See also Greyhound Computer Corp.* v. *IBM Corp., supra;* Petition, pp. 20-21, 25, 27 n. 41).

The brief in opposition pointedly avoids the determination by the Court of Appeals that the jury was barred from considering Kodak's decision not to give predisclosure in even the limited respect referred to in the charge, *i.e.*, as an ameliorative measure in view of other exclusionary conduct (A 265-66). (See also Petition, pp. 12-13, 29-31). That determination, undoubtedly fundamental to the setting aside of the $45,750,000 camera damage award, clearly enunciates the proposition that the withholding of predisclosure cannot, under any circumstances, be relevant to unlawful monopolization. It thus, contrary to both Kodak's denial that a *per se* rule was adopted (Brief in Opposition, p. 14) and the last described approach of the Ninth Circuit, eliminates from antitrust scrutiny a monopolist's determination as to predisclosure—even when unrelated to technical matters or advances—without regard to the surrounding market structure, purpose or effect (see Petition, p. 29, citing other precedents contrary to the view of the Court of Appeals).

On the other hand, Kodak relies (Brief in Opposition, p. 8) on matters not in the trial record[6] in support of the erroneous contention that this case involved a demand for a broad requirement of predisclosure. Kodak facilely labels "false" (Brief in Opposition, p. 8) the detailed demonstration of the limited significance of predisclosure at the trial (Petition, pp. 3, 11-13, 29-31), but points to no part of the trial or appellate record which supports Kodak's contention that (i) Berkey sought predisclosure relating to cameras (Berkey urged only that new film formats

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[6] *E.g.*, Kodak cites (Brief in Opposition, p. 8) Berkey's early answers to interrogatories (C438-43) which were never presented to the jury and do not reflect contentions made during any proceedings here relevant.

should be disclosed)[7] or (ii) it was the cornerstone of the liability claim.

2. This Court should not require further protracted and misdirected proceedings before ruling on questions of first impression relating to the film and paper overcharge claims.

Kodak conclusorily asserts (Brief in Opposition, pp. 16-17; Cross-Petition in 79-499, p. 5) that the film and paper overcharge claims ought not be reviewed at this time in view of the remand for a new trial. Notwithstanding a direction for further proceedings, this Court has repeatedly expressed its willingness to grant certiorari to review questions which are "fundamental to the further conduct of a case"[8] in order "to prevent extraordinary inconvenience"[9] and "before the plaintiff is put to the difficulties and the courts to the inconvenience . . . required under a mistake."[10]

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[7] Kodak describes as statements by Berkey's counsel matter at A265 (Brief in Opposition, p. 8) which is part of the charge and does not support a broad description of predisclosure; characterizes a statement at A413 (Brief in Opposition, p. 9) as seeking "advance notice of the system" while the statement there referenced was explicitly limited to the film and cartridge.

[8] *Land* v. *Dollar*, 330 U.S. 731, 734 n. 2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

[9] *American Construction Co.* v. *Jacksonville T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

[10] *In re Simons*, 247 U.S. 231, 239 (1918). *See also Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-53 (1964), referring to the savings to the parties and the fact that both had urged the Supreme Court to review fundamental questions before the further proceedings took place; *Larson* v. *Domestic & Foreign Commerce Corp., supra* at 685. While Kodak expresses some cryptic uncertainty as to the "decisional consequences" of the opinion (Brief in Opposition, p. 2) it does not gainsay the burdensome and confused nature of future proceedings if the decision is not reviewed.

The instant case comes before this Court on a record which reflects a full and careful jury trial of over eight months under rulings by the District Judge which limited Berkey to proof of anticompetitive conduct since 1969.[11] The directed retrial will necessarily include proof of conduct over a sixty year or more period and, *inter alia,* the difficult, time consuming and perhaps futile exercise of attempting to relate particular acts over this period to price increments during the limitations period (see Petition, p. 35 and nn. 46, 47). All of this is avoidable if the first trial was proper. All is wasted if the Court of Appeals erred, as Berkey contends in this petition, or as Kodak urges in its petition in 79-499. Ultimately, the questions involved require resolution by this Court, and Kodak does not respond to the showing (Petition, pp. 31-35) that, as the Court of Appeals recognized (71a-73a), certain of these questions had not previously been decided.[12]

Any further trial at this time would, moreover, be fraught with uncertainty in view of the inconsistencies and lack of clarity in the Court of Appeals' opinion. Illus-

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[11] Kodak's oft repeated contention (Brief in Opposition, pp. 9-10, 16-17) that the District Judge required no causal link between exclusionary conduct and the damages in film and paper is simply wrong. The charge required that damages be limited to those overcharges attributable to unlawful monopolization due to exclusionary conduct and excluded amounts due to other factors (A458-64). See Petition, pp. 15 n. 22, 18. See also Respondent's Brief in 79-499, p. 3 n. 3, persuasively refuting Kodak's description (Cross-Petition, pp. 3-4 and repeated here, Brief in Opposition, p. 9) of the anticompetitive conduct shown in the film and paper markets and demonstrating that it did not depend on product introductions.

[12] Kodak does not gainsay the applicability of the principles here involved in the pending complex and important cases cited by Berkey (Petition, pp. 22-23 n. 36). The cavalier suggestion (Brief in Opposition, p. 15) that they will somehow be correctly decided without some guidance by this Court is neither persuasive nor tenable in view of the difficulties reported by these Courts and the conflicting opinions in the field (see also p. 4 *supra*).

tratively, the Court of Appeals rejected virtually all of Kodak's challenges to the jury instructions, found that the jury could not find the camera related conduct of the integrated company exclusionary but its analogous photofinishing related conduct could have been.[13] Kodak now claims that the camera decisions apply to the film market on remand *"a fortiori"* (Brief in Opposition, p. 10 n. 11) and render the jury instructions clearly erroneous (*id.* at 17). In fact, the opinion is silent on the standards applicable to the retrial on photofinishing, whether the camera or photofinishing rulings control in reviewing the related film and paper conduct, and how, if at all, the charge is to be revised on the manner of determining if particular conduct was anticompetitive. Indeed, the burden of proof on these critical questions was specifically left open (74a n. 58).

3. Kodak's contention that its monopolies are based on salutary conduct and are socially desirable flouts the record, the jury findings and the condemnation of monopoly reflected in the Sherman Act. It thus further focuses the case on critically important issues which should be reviewed by this Court sooner rather than later.

In opposing certiorari and defending the result below, Kodak disregards the explicit and implicit jury verdicts that its monopolies are due to exclusionary conduct and artificial barriers to entry.[14] Instead it points to, as osten-

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[13] The Court of Appeals seems to be suggesting the need for some further factual determinations on the photofinishing claim although further factual determinations were not found relevant on the camera claim (see Petition, pp. 16-17).

[14] The proof also precluded Kodak's current re-argued contentions that Berkey was not an innovative camera manufacturer (Brief in Opposition, p. 5 n. 4) and that Berkey was not injured (Brief in Opposition, p. 6). Kodak's own counsel refuted the former contention (A582) and the District Judge recognized Berkey's injuries to be established beyond dispute (A1671-72).

sible facts, its assertedly salutary conduct and quality products as the reasons it has maintained its monopolies.[15] It inconsistently urges that it was inappropriate to permit the jury to consider the evidence that showed the lack of Kodak product quality or innovation (Brief in Opposition, p. 7 n. 7). The two conspiracies in violation of Section 1, as found by the jury (187a), District Judge (104a, 123a, 149a) and Court of Appeals (87a), are ignored in Kodak's "explanation" of the reason it holds a camera monopoly (Brief in Opposition, p. 3 n. 1).[16] Kodak wholly ignores that it demanded the jury whose results it now discards so completely and which are so fundamentally inconsistent with the conclusions and approaches of the Court of Appeals. (See also Petition, pp. 16, 24-25).

Kodak defends this approach, and its adoption by the Court of Appeals, by contending that testing its monopolies, under standards of *Alcoa* and similar authorities, grants judges and juries the power to arbitrarily transfer wealth (Brief in Opposition, p. 13) and bring about diversification of monopoly power (Brief in Opposition, p. 15), the existence of which it argues to be in the public interest (Brief in Opposition, p. 3 n. 1). This candid articulation of the alleged justification for the rejection of scrutiny under

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[15] *See, e.g.*, Brief in Opposition, pp. 3 and n. 1, 7, 9-10, 12-13. The contentions there made are neither true, sustainable in view of the jury verdict nor even supported by such record references as are given. All were argued to the jury at some length and their rejection should have barred repetition in this Court. Illustratively, Kodak would have this Court reject as untenable (Brief in Opposition, p. 4 and n. 2), the abundant proof of Kodak's efforts to limit the quality or efficiency of other photofinishers, in the face of explicit findings thereon by the jury (183a), District Judge (120a-21a) and Court of Appeals (56a-58a, referring to Kodak's "shoddy treatment" of photofinishers). As the District Judge observed (129a), this was a part of Kodak's scheme to erect barriers to entry by film and papers makers.

[16] Kodak has not sought review of those findings (Cross-Petition in 79-499, p. 3 n. 2).

the antitrust laws by juries, and perhaps judges, of conduct undertaken by businesses in their self-interest, abandons even a pretense of arguing that the jury verdicts were afforded proper deference. Kodak thus presents explicitly the tension, reflected in the opinion below, between trial and review of antitrust cases by traditional standards of binding fact finding as against appellate nullification based upon assumptions with respect to the benefits of integrated monopolists or other issues.

The many pending complex cases under Section 2 (see Petition, pp. 22-23 n. 36) and conflicting views of the law (see, *e.g.*, p. 4, *supra*, and Petition, pp. 20-23, 26-28, 34-35), require the resolution of these issues by this Court. If they are addressed at an early date, there is considerably less likelihood of wasted effort in the lower courts. We respectfully submit that this Court should now address: the questions raised by this case which are fundamental to Section 2 of the Sherman Act; the role of judges and juries in deciding complex cases with potential wide economic implications;[17] whether private antitrust litigation should no longer be looked upon as a salutary means of antitrust enforcement and therefore burdened with impossible standards of proof; and whether contemporary economic conditions can tolerate rules which test persistent monopolies, and their inflationary effects on price, more favorably than do *Alcoa, American Tobacco, Griffith* and *Grinnell.* Kodak's brief in opposition permits none to gainsay that the breadth of the issues here involved goes to the essence of the antitrust laws.[18]

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[17] Recently described as "one of the raging questions in the law today." *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1979-2 Trade Cas. ¶ 62,893 at 79,171 (E.D. Pa. 1979).

[18] We note the pleas of responsible commentators for guidance from this Court on antitrust issues of wide national moment. *E.g.*, January 1979 Report of the National Commission For Review of Antitrust Laws and Procedures 146-47, 156; Posner, *The Antitrust Decisions of the Burger Court*, 47 Antitrust L. J. 819, 824-27 (1978).

Conclusion

The briefs on the two petitions for certiorari addressed to the decision of the Court of Appeals confirm its own view that this is "one of the largest and most significant private antitrust suits in history" (5a). Both sides have sought review of determinations made by the Court of Appeals which were generally decided differently by the District Judge. The questions involved will ultimately have to be decided by this Court. It would be an undue burden on the judiciary and the parties, and a cruel waste, to defer those rulings to another day, while this and other extended and complicated Section 2 cases are tried and reviewed at a prohibitive cost to the courts and litigants. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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